EX PARTE OR LATE FILED

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Kathleen Q. Abernathy
Vice President - Regulatory Affairs

U S WEST

December 10, 1998

WRITTEN EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Mail Stop 1170
Washington, D.C. 20554

RE: CC Docket No. 98-147, Deployment of Advanced Telecommunications Services

Dear Ms. Salas:

Enclosed is a letter with attachment submitted today as a written ex parte to Brent Olson and Staci Pies of the Common Carrier Bureau. Please include this letter and the attachment in the record for the above referenced proceeding.

In accordance with Section 1.1206(b)(1) of the Commission's rules, the original and one copy of this letter, with attachment, are being filed with your office. Acknowledgment and date of receipt of this transmittal is requested. A duplicate of this letter is included for this purpose.

Please contact me should you have any questions concerning this matter.

Sincerely,

Kathleen Abernathy

cc: Brent Olson
Staci Pies

Attachment

U S WEST, Inc.
1801 California Street, Suite 5100
Denver, Colorado 80202
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Facsimile 303 295-6973

Robert B. McKenna
Associate General Counsel

December 10, 1998

Mr. Brent Olson
Ms. Staci Pies
Federal Communications Commission
Common Carrier Bureau
Office of Plans & Policy
1919 M Street, NW
Suite 500
Washington, DC 20554

Dear Mr. Olson and Ms. Pies:

The question has arisen as to just what "separate subsidiary" rules for U S WEST provision of advanced telecommunications services might be adopted which would permit U S WEST to offer advanced telecommunications services to a wide market. U S WEST has observed that the proposed separate subsidiary rules would have the effect of depriving many potential customers of advanced telecommunications services because the proposed rules, by imposing regulatory inefficiencies on U S WEST, would destroy much of the economic ability of U S WEST to provide service to the mass market customers. These unserved customers are also not obtaining service from competitors, who are focusing their efforts on more profitable customer segments. Thus, the proposed subsidiary rules could have the unwanted impact of actually depriving Americans of advanced telecommunications services. This memorandum examines very briefly some aspects of separate subsidiary operation which could mitigate what might otherwise be destructive impacts of a separate subsidiary requirement.

- Loops.
    - Currently, U S WEST has an obligation to make unbundled loops available to competitive carriers, and makes conditioned loops available on the same terms as are available to its own DSL operations. However, proper accounting and economics requires that a customer's loop be priced the same no matter how many services U S WEST puts over the loop, and that the cost of the loop not be "allocated" among services, particularly if such "allocation" results in additional implicit subsidies for other customers. Any separate subsidiary rules must avoid such cost allocation mistakes.
    - Similarly, frequency unbundling of a loop would be inefficient, uneconomical and potentially destructive. An ILEC should be able to put whatever services the customer desires on a loop without being required to give competitors individual frequency within a loop. Any subsidiary rules would need to be tailored to permit the

subsidiary to share a loop with the ILEC without similar sharing arrangements being available to others.

- Joint installation and maintenance. In many areas it would be uneconomical for U S WEST to deploy technicians only for advanced telecommunications services. Sharing such technicians with competitors would be uneconomical because their primary work involves the basic network.

- Joint marketing. The ability to provide "one stop shopping" is a critical element of serving the mass market.

- Customer information. Advanced telecommunications services should be considered as being in the same "bucket" as other telecommunications services.

- Joint network planning. It is critical that USWC and any subsidiary be able to share network information and other relevant plans to permit joint planning of network operations and services. Make-buy network disclosure provides sufficient protection to competitors that advance network information will not be used in an anti-competitive manner.

- Shared infrastructure. Many facilities (e.g., ATM switches) will, in the future, be able to provide traditional voice services as well as advanced telecommunications services. Reasonable sharing of such infrastructure at accounting rates which are reasonable (e.g., no three year peak usage accounting) will permit rational deployment of advanced telecommunications services for the mass market.

Sincerely,

Robert B. McKenna

Robert B. McKenna
Associate General Counsel

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December 8, 1998

MEMORANDUM

SUBJECT: Transfer of "Nonbottleneck" Facilities to an Advanced Service Affiliate Does Not Subject the Affiliate to Incumbent LEC Obligations

In the *Advanced Services NPRM*, the Commission proposed an "alternative pathway" for incumbent LECs to provide advanced services free from obligations under section 251(c) through separate affiliates. *Advanced Services NPRM* ¶ 83. But the NPRM contemplates effectively limiting that relief to ILECs that have not yet made any substantial deployment of advanced services. For those ILECs such as U S WEST that have been at the forefront of bringing such services to consumers, the NPRM tentatively concludes that "a wholesale transfer of such facilities would make an affiliate the assign of the incumbent LEC" under section 251(h) and therefore itself an ILEC subject to section 251(c). *Advanced Services NPRM* ¶ 106.

Such a mechanical application of sections 251(h) and (c) would neither make sense nor be consistent with commonly accepted legal interpretations of the term "successor or assign." The regulatory treatment of a particular carrier must depend on the service provided or the carrier's position in the marketplace, not on when the carrier began offering service in relation to the Commission's decision in this proceeding. The latter approach would be worse than irrational: It would have the anticompetitive effect of penalizing carriers for aggressively bringing new services to customers and would slow the implementation of new technologies by encouraging market participants to take a regulatory wait-and-see strategy.

Fortunately, section 251(h) does not compel or even permit such a perverse result. There is no single universally applicable definition of "successor or assign." Rather than being applied in a vacuum, the term derives its meaning from the specific context in which it is used. As the Commission has recognized elsewhere, section 251(h) — mirroring the general approach of successor/assign jurisprudence — requires the Commission to look to the underlying purpose of section 251(c) in determining whether the transfer of assets to an advanced service affiliate makes the affiliate an ILEC. Because the purpose of section 251(c) is to make available to competitors the facilities that make an ILEC an ILEC — the potentially bottleneck facilities used in providing traditional telephone services — a transfer of nonbottleneck facilities (DSLAMs, packet switches, and other similar property) used in providing advanced services does not make the affiliate an ILEC. What is more, even if the Commission, incorrectly, concluded otherwise, an affiliate should not be subject to the unbundling requirements of section 251(c), because failure to unbundle such nonbottleneck facilities would not impair the ability of a requesting carrier to provide advanced services.

1. An ILEC's Transfer of Nonbottleneck Assets to an Advanced Service Affiliate Does Not Make the Affiliate a Successor or Assign for Purposes of Section 251(h).

The Commission should reject the NPRM proposal to treat an ILEC's advanced service affiliate itself as an ILEC where the parent transfers advanced service facilities or customers to the affiliate. So long as the ILEC transfers only competitively available assets to the affiliate, and not bottleneck facilities such as loops or other networks elements used to provide traditional services, the affiliate is not a "successor or assign" for purposes of section 251(h)(1)(B)(ii).

The purpose of statutory provisions extending regulatory and other obligations to successors and assigns is to ensure that the primary regulated entities do not avoid their obligations under the law by transferring their key assets to different corporations or other businesses. In labor law and other contexts, the courts have given effect to this goal by looking to whether there is "continuity" between the transferor and transferee entities. The existence of such continuity depends on the nature of the legal obligations that apply to the transferor and whether extending those obligations to the transferee would serve the purposes of the applicable statute or policy. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195, 201 (7th Cir. 1986); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974); *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 245 (8th Cir. 1991) (defining statutory "successor in interest" term in manner "most consistent with Congress' intent under the veterans' reemployment statute"). The Commission itself, in determining who may participate in a proceeding, has recognized that an entity can be a "successor" for one purpose and not for other purposes. *Pine Tree Media, Inc.*, 9 FCC Rcd 2770 (1994).

Thus the pivotal inquiry in determining whether an ILEC's advanced service affiliate is a successor or assign of an ILEC for purposes of section 251(h)(1)(B)(ii) is an examination of the purposes of the obligations imposed on ILECs by section 251(c). The Commission has already undertaken just such an inquiry under another provision of section 251(h), and its reasoning in that decision is equally applicable here. In *Guam Public Utils. Comm'n*, Declaratory Ruling and NPRM, 12 FCC Rcd 6925 (1997), the Commission concluded that section 251(h)(2) — which authorizes the Commission to apply ILEC regulation to "comparable" carriers — is designed to

extend the obligations of section 251(c) to entities that, like ILECs, "control the bottleneck local exchange network" and "possess substantial economies of density, connectivity, and scale that, absent compliance with the obligations of section 251(c), can impede development of telephone exchange service competition." *Id.* ¶ 26. The "successor or assign" provision in section 251(h)(1)(B)(ii) plainly has the same goal. Nothing in the Act suggests that that section has any broader purpose of extending ILEC regulation to entities that are not comparable to ILECs.

To the contrary, the Commission has already determined that ILEC regulation of assets by an affiliate to provide advanced services would not serve the purpose of section 251(c). The NPRM proposes that an ILEC affiliate be free to buy and hold such facilities free of section 251(c) obligations. Obviously, no purpose of section 251(c) would be served by treating the assets differently simply because an ILEC acted early to make the benefits of advanced services available to consumers before the Commission announced its decision, and thereafter transferred the assets to the affiliate that the Commission invited it to establish.

In sum, successor/assign jurisprudence requires that any entity be evaluated for successor/assign status in a manner that itself carries out the purpose of the Act. Therefore, the Commission clearly has the authority to withhold such status from any affiliate formed by an ILEC. Just as the Commission has proposed to deem an advanced service affiliate that purchases facilities not to be a successor or assign, it can and should make the same determination regarding an affiliate to which an ILEC transfers assets or customers.

2. Even If Transferring Advanced Service Assets to an Affiliate Made the Affiliate an ILEC, the Affiliate Still Would Not Be Required to Unbundle Those Facilities.

The *Advanced Services NPRM* appears to assume that, if an ILEC's advanced service affiliate is itself deemed to be a ILEC by virtue of having received assets from its parent, the affiliate must necessarily unbundle that equipment whenever unbundling is technically feasible. *See Advanced Services NPRM* ¶¶ 106-07. But that assumption skips an essential step: Even if the affiliate were deemed to be an ILEC, the Commission could require it to unbundle only those network elements that meet the standards set forth in section 251(d)(2). In particular, the Commission could mandate unbundling of the transferred facilities *only if* "the failure to provide access to such network elements would impair the ability of [a requesting] carrier to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B).[1/] As the Eighth Circuit held, skipping this step and declaring that an incumbent must unbundle everything that is technically feasible to unbundle violates Congress's instructions:

> [S]ubsection 251(c)(3) places a duty on incumbent LECs to provide "access to network elements on an unbundled basis at any technically feasible point." By its very terms, this provision only indicates where unbundled access may occur, not which elements must be unbundled. Subsection 251(d)(2) establishes the standards to determine which elements must be unbundled, and this section makes no reference to technical feasibility. We think that the FCC's interpretation that an element for which unbundling is technically feasible must presumably be unbundled is contrary to the plain meaning of the Act and cannot stand.

Iowa Utils. Bd. v. FCC, 120 F.3d 753, 810 (8th Cir. 1997).[2/]

[1/] In addition, the Commission could require the affiliate to unbundle proprietary network elements only to the extent that such unbundling is "necessary." *Id.* § 251(d)(2)(A).

[2/] Neither the Commission nor any other party sought review of this holding in the Supreme Court.

Nonbottleneck DSLAM and packet switching facilities held by an ILEC's advanced service affiliate do not meet the statutory standard for mandatory unbundling. The very premise of the Commission's separate affiliate proposal is that, as long as certain essential inputs (such as unbundled loops and collocation) are available from the incumbent on an equal basis, any CLEC can provide advanced services on a par with the incumbent's affiliate by obtaining its own DSLAMs and other equipment; the CLEC does not need access to facilities held by the affiliate.[3/] The reason why that premise is correct is that denying a CLEC access to the affiliate's facilities does not "impair" its ability to provide service, and the affiliate — even if it is deemed to be an ILEC — cannot be required to unbundle that equipment. 47 U.S.C. § 251(d)(2)(B). There is no legal or logical reason to distinguish in this regard between facilities that the affiliate purchases itself and facilities that are transferred from the incumbent: A DSLAM is the same piece of equipment (and its potential utility to a CLEC is exactly the same) regardless of whether its original purchaser was the incumbent or the affiliate.

[3/] *Cf. Advanced Services NPRM* ¶ 94 (rejecting CLEC argument that, "regardless of how a separate affiliate is structured, new entrants should be able to obtain unbundled access to all such facilities used by the affiliate to provide advanced services").